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Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd (formerly known as PPH Resorts (Penang) Sdn Bhd)

B HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-167–02 OF 2012
VARGHESE GEORGE J
19 AUGUST 2013

C *Civil Procedure — Limitation — Claim for arrears of electricity consumption — User granted up to 23 October 2005 to effect settlement — Six year period of limitation to commence on 23 October 2005 — Tenaga Nasional Bhd ('TNB') claim time barred*

D *Contract — Settlement — Settlement agreement — TNB and user entering into deed of settlement for settlement of arrears — User defaulting payment after paying three instalments — Whether deed ultra vires TNB's powers under Electricity Supply Act 1990 — Whether user estopped from challenging validity of deed*

E

Public Utilities — Electricity — Charges for electricity — Default in paying utility charges — TNB and user entering into deed of settlement for settlement of arrears — User defaulting payment — Claim for outstanding payments — Whether TNB's claim statute barred — Whether deed ultra vires TNB's powers under Electricity Supply Act 1990 — Whether user stopped from challenging validity of deed — Whether TNB had wrongfully disconnected electricity to premises

F

G *Public Utilities — Electricity — Contract to supply — Whether TNB may validly impose a 'connected load charge' — Electricity Supply Act 1990 s 29(1) & (2)*

The plaintiff had supplied electricity to the defendant's premises. The defendant had defaulted in settling the charges for electricity consumed at the premises and on 10 June 2005 the defendant entered into a deed of settlement ('the deed') with the plaintiff whereby the defendant agreed to settle the admitted arrears of payments by ten monthly instalments. The defendant only paid three instalments and thereafter defaulted payment. The plaintiff instituted this action on 28 February 2012 to recover the outstanding electricity charges due from the defendant after having given credit for amounts realised from a bank guarantee and deposits paid by defendant. The defendant contended that: (a) the plaintiff's claim was statute barred; (b) the deed was null and void being ultra vires the authority or powers of the plaintiff under the Electricity Supply Act 1990 ('the Act') to impose the 'connected load

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charge' ('CLC') which had been included in the computation of the arrears under the deed; and (c) the plaintiff had wrongfully disconnected electricity to the premises. The defendant also counterclaimed for refund of the instalments paid under the deed, repayment of the bank guarantee amount, repayment of the deposit sums and a sum of RM75,000 alleged to be the cost of operating and maintaining an alternative generator for supply of electricity after the electricity supply to the premises was disconnected by the plaintiff. The defendant also raised a preliminary issue that the arrears in electricity charges claimed by the plaintiff was under Account No 0261–00718078–09 whilst the contract between the parties bore another account number, namely No 0054296000.

Held, dismissing the plaintiff's claim and the defendant's counterclaim:

(1) The premises to which electricity was supplied, notwithstanding the two different account numbers, was the same. What had occurred was merely a renumbering of the account related to the same electricity supply contract to the premises. There was no merit at all in the defendant's preliminary contention (see paras 14–15).

(2) The defendant was estopped from challenging the validity of the deed. The defendant had led the plaintiff to believe that the defendant would honour their admission of debt and the commitment to settle the arrears by the agreed instalments. This had been further affirmed by defendant's conduct in that, three instalments due pursuant to the terms of the deed were paid by the defendant. It was too late in the day, upon default and when sued, to cry 'foul' and take the position that the deed was invalid ab initio and not binding on the defendant (see para 18).

(3) Section 29(1) and (2) of the Act provides that notwithstanding anything provided in s 24 to s 28 of the Act, there could exist a special agreement for the supply of electricity and the rights and liabilities of the parties shall be determined by such agreement. There was no prohibition against including a term such as to require CLC to be included in the monthly bills raised by the plaintiff. On the other hand, there was an enabling provision for special terms or agreement to be entered into by the plaintiff with a consumer. There was also no evidence that the defendant had not freely agreed to accept that further contractual term. Hence, the term as regards the payment of CLC charges as part of the defendant's monthly electricity charges was therefore not ultra vires the Act. The defendant was also fully cognisant of and did not dispute the defendant's liability to settle the CLC (see paras 23–24).

(4) The deed was valid and enforceable by the plaintiff and the contentions of the defendant to avoid meeting their obligations under the deed, or for that matter, the contract with the plaintiff for the supply of electricity to the premises was wholly without merit (see para 30).

(5) There was no ambiguity or inconsistency in respect of the amount claimed by the plaintiff. What the plaintiff was claiming in this action was not for 'damages' but for outstanding sum due on bills raised for electricity supplied and the plaintiff's claim was grounded further on the admission of the defendant expressly set out in the deed. The defendant was the party who raised the issue as to inconsistency or discrepancy in the amount claimed and it was for the defendant to discharge that evidential burden. The defendant had failed to do so (see paras 31 & 35).

(6) The seven days minimum period of notice before disconnection had been given by the plaintiff. Further, the defendant's solicitor's protest in respect of the disconnection came only some seven months later and was of no consequence, save for the inference that could be drawn there from that the defendant had no reasonable or immediate dispute as to the plaintiff's right to disconnect electricity to the premises as was done on 5 October 2005 (see paras 39–40).

(7) The time for the calculation of the six year period only commenced on 23 October 2005. The plaintiff had in their *Notis Pemotongan Bekalan Elektrik* of 24 September 2005 demanded payment of all sums owed to the plaintiff within thirty days of service of that notice. The defendant had therefore been granted up to 23 October 2005 to effect settlement and the plaintiffs cause of action to recover the debt owed by the defendant accrued only upon the defendant's failure to settle the demanded sum on that later date. Hence, on 28 February 2012 when this action was filed, the plaintiff no longer had any actionable cause of action. The plaintiff could only have legally succeeded on their claim if the suit had been filed before 22 October 2011 (that is, within six years of 23 October 2005) (see paras 47–48).

[Bahasa Malaysia summary

Plaintif telah membekalkan elektrik kepada premis defendan. Defendan telah ingkar dalam menyelesaikan caj elektrik yang digunakan di premis tersebut dan pada 10 Jun 2005, defendan memasuki surat ikatan penyelesaian ('surat ikatan') dengan plaintif di mana defendan bersetuju untuk menyelesaikan tunggakan pembayaran yang diakui dengan sepuluh bayaran bulanan secara ansuran. Defendan cuma membayar tiga ansuran dan kemudian ingkar dalam pembayaran. Plaintif memulakan tindakan ini pada 28 Februari 2012 untuk mendapatkan semula caj eletrik terhutang daripada defendan selepas memberikan kredit bagi jumlah yang direalisasikan daripada jaminan bank dan deposit-deposit yang dibayar oleh defendan. Defendan menghujahkan bahawa: tuntutan plaintif dihalang oleh statut; surat ikatan adalah batal dan tidak sah kerana ultra vires kuasa plaintif di bawah Akta Bekalan Elektrik 1990 ('Akta') untuk mengenakan 'connected load charge' ('CLC') yang disertakan dalam pengiraan tunggakan bawah surat ikatan; dan plaintif telah secara salah memutuskan elektrik di premis. Defendan menuntut balas bagi pemulangan

semula ansuran-ansuran yang telah dibayar di bawah surat ikatan, pembayaran semula jumlah jaminan bank, pembayaran semula jumlah-jumlah deposit dan sejumlah RM75,000 yang didakwa sebagai kos operasi dan penyenggaraan penjana alternatif bagi pembekalan elektrik di premis diputuskan oleh plaintif. Defendan membangkitkan isu awalan bahawa tunggakan caj elektrik yang dituntut oleh plaintif adalah di bawah No akaun 0261–00718078–09 sedangkan kontrak antara pihak-pihak mempunyai nombor akaun berbeza, iaitu No 0054296000.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan:

(1) Premis di mana elektrik dibekalkan, walaupun mempunyai dua nombor akaun berbeza, adalah sama. Apa yang berlaku cumalah penomboran semula akaun bagi kontrak pembekalan elektrik yang sama kepada premis. Tiada merit sama sekali dalam hujahan awalan defendan (lihat perenggan 14–15).

(2) Defendan diestop daripada mencabar keesahan surat ikatan tersebut. Defendan telah membuatkan plaintif percaya bahawa defendan akan berpegang pada pengakuan hutang dan tanggungan untuk menyelesaikan tunggakan melalui ansuran-ansuran yang dipersetujui. Ini disahkan selanjutnya oleh tindakan defendan dalam, tiga ansuran berikutan terma surat ikatan yang dibayar oleh defendan. Adalah sudah terlambat untuk defendan mengadu mengenainya apabila telah ingkar dan disaman dan mengambil kedudukan bahawa surat ikatan adalah tidak sah ab initio dan tidak mengikat ke atas defendan (lihat perenggan 18).

(3) Seksyen 29(1) dan (2) Akta memperuntukkan bahawa walau apa pun yang diperuntukkan dalam ss 24 dan 28 Akta, boleh wujud satu perjanjian khas bagi pembekalan elektrik dan hak-hak dan liabiliti-liabiliti pihak-pihak akan diputuskan oleh perjanjian tersebut. Tiada larangan daripada memasukkan terma seperti memerlukan CLC untuk disertakan dalam bil-bil bulanan yang dikeluarkan oleh plaintif. Di samping itu, terdapat peruntukan yang membenarkan terma-terma atau perjanjian khas untuk dimasuki oleh plaintif dengan pelanggan. Tidak terdapat juga keterangan bahawa defendan telah dengan tidak sukarela bersetuju untuk menerima terma kontrak lanjut. Dengan itu, terma bagi pembayaran caj CLC sebagai sebahagian caj elektrik bukan ultra vires Akta. Defendan juga sedar sepenuhnya dan tidak mempertikaikan liabiliti defendan untuk menyelesaikan CLC (lihat perenggan 23–24).

(4) Surat ikatan tersebut sah dan boleh dikuatkuasakan oleh plaintif dan hujahan-hujahan defendan untuk mengelak daripada memenuhi kewajipan-kewajipan mereka di bawah surat ikatan, atau atas sebab itu,

kontrak dengan plaintif bagi pembekalan elektrik ke premis adalah sama sekali tanpa merit (lihat perenggan 30).

(5) Tiada kesamaran atau percanggahan berkenaan jumlah yang dituntut oleh plaintif. Apa yang dituntut oleh plaintif dalam tindakan ini bukanlah untuk 'ganti rugi' tetapi bagi jumlah terhutang daripada bil-bil yang dikeluarkan untuk elektrik yang dibekalkan dan tuntutan plaintif selanjutnya berasaskan pada pengakuan defendan yang dinyatakan dengan jelas dan surat ikatan. Defendan adalah pihak yang membangkitkan isu percanggahan dalam jumlah yang dituntut dan adalah bagi defendan untuk melepaskan beban pembuktian itu. Defendan gagal berbuat demikian (lihat perenggan 31 & 35).

(6) Tempoh notis minimum tujuh hari sebelum pemotongan telah diberikan kepada plaintif. Selanjutnya, protes peguamcara defendan mengenai pemotongan dibangkitkan selepas tujuh bulan kemudiannya dan tidak penting, kecuali mengenai inferens yang boleh disimpulkan bahawa defendan tidak mempunyai pertikaian munasabah atau segera mengenai hak plaintif untuk memutuskan elektrik ke premis seperti yang telah dilakukan pada 5 Oktober 2005 (lihat perenggan 39–40).

(7) Masa bagi pengiraan tempoh enam tahun hanya bermula pada 23 Oktober 2005. Plaintif telah, dalam 'Notis Pemotongan Bekalan Elektrik pada 24 September 2005' menuntut pembayaran kesemua jumlah yang terhutang kepada plaintif dalam 30 hari penyampaian notis tersebut. Defendan telah, dengan itu, dibenarkan hingga 23 Oktober 2005 untuk menguatkuasakan penyelesaian dan kausa tindakan plaintif untuk mendapatkan semula hutang yang terhutang daripada defendan bermula hanya dengan kegagalan defendan untuk menyelesaikan jumlah yang dituntut pada tarikh lanjut. Oleh itu, pada 28 Februari 2012 apabila tindakan ini difailkan, plaintif tidak lagi mempunyai kausa tindakan untuk diambil tindakan. Plaintif hanya boleh berjaya dalam tuntutan mereka secara perundangan jika guaman telah difailkan sebelum 22 Oktober 2011 (iaitu dalam masa enam tahun daripada 23 Oktober 2005) (lihat perenggan 47–48).]

Notes

For a case on contract to supply, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) para 2241.

For cases on charges for electricity, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2237–2240.

For cases on settlement agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6370–6376.

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, CA (refd)

Aseambankers Malaysia Berhad and Ors v Gula Perak Berhad and Anor [2010] MLJU 1527; [2010] 1 LNS 1409, HC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151; [1998] 3 CLJ 503, FC
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2012] 2 MLJ 314; [2012] 1 CLJ 959, CA (refd)

Legislation referred to

Contracts Act 1950 ss 2, 24
Electricity Supply Act 1990 ss 24, 25, 26, 26A 27, 28, 29(1), (2)
Evidence Act 1950 s 114 (g)
Licensee Supply Regulations 1990 reg 4(1), (2)
Limitation Act 1953 ss 6(1)(a), 26(2)

SL Mah (Shahrizat Rashid & Lee) for the plaintiff.
JJ Chan (Fazleeza Azli with him) (Shearn Delamore & Co) for the defendant.

Varghese George J:

[1] After a full trial I had on 19 March 2012 dismissed both the plaintiff's claim and the defendant's counterclaim in this suit. I had also ordered that each party bear their own costs.

The plaintiff has appealed and the defendant has also lodged a cross-appeal against my aforesaid decisions.

[2] I now set out the full grounds for my judgment in the matter.

THE BACKGROUND

[3] Since 2001, the plaintiff had supplied electricity to a premises on Lot 8134, Jalan Relau, Bayan Lepas, Pulau Pinang (also known as No 8, Persiaran Kelicap, 11900 Bayan Lepas, Pulau Pinang). It was not in dispute that the premises is question was a club and golf course known as Pearl Island Country Club owned by the defendant.

[4] The defendant had been in default of settling the charges for electricity consumed at the premises and on 10 June 2005 the defendant entered into a

deed of settlement with the plaintiff whereby in essence, the defendant agreed to:

(a) settle the admitted arrears of payments then due and owing to the plaintiff amounting to RM463,334.08, by ten equal monthly instalments commencing 24 June 2005; and

(b) to also with effect from 24 September 2005 settle the current monthly electricity charges incurred by the defendant, together with the aforesaid instalments.

[5] The defendant paid the agreed monthly instalments of RM25,000 each due on 24 June 2005, 24 July 2005 and 24 August 2005 (three instalments) but failed to pay the instalment due on 24 September 2005, as well as the then outstanding current monthly charges payable to the plaintiff.

[6] The plaintiff instituted this action on 28 February 2012 to recover from the defendant:

(a) the outstanding electricity charges due from the defendant in the net sum of RM510,747.17 (stated to be derived after having credited to account, (i) the sum of RM80,000 realised from a bank guarantee dated 8 July 2005, and further (ii) the deposit sums of RM13,219.47 and RM3,310.22 paid by the defendant and held by the plaintiff); and

(b) interest on the said sum outstanding from date of judgment until full realisation.

[7] The main line of defence advanced by the defendant was that the plaintiff's claim was statute barred in that it had been filed after the expiry of the six years period allowed for such action to be brought.

The defendant's alternative stance was that the deed of settlement entered into was null and void being ultra vires the authority or powers of the plaintiff under the Electricity Supply Act 1990 or any relevant regulation to impose the 'connected load charge', which had been included in the computation of the arrears under the deed of settlement and even subsequently in the bills raised by the plaintiff.

It was also alleged by the defendant that the plaintiff had wrongfully and in contravention of relevant regulations disconnected electricity to the premises allegedly on 1 October 2005.

[8] Predicated principally on the alternative defence as aforesaid, the defendant's counterclaimed for:

(a) refund of the instalments effected pursuant to the deed of settlement in the total sum of RM75,000;

(b) the repayment of the sum of RM80,000 under the bank guarantee, which the defendant claimed to have been wrongfully demanded upon and received by the plaintiff;

(c) the aggregated sum of RM16,529.69 being the deposit sum alleged to have been wrongfully appropriated by the plaintiff;

(d) a sum of RM75,000 alleged to be the cost of operating and maintaining an alternative generator for supply of electricity to the premises allegedly incurred by the defendant, after the electricity supply to the premises was disconnected by the plaintiff;

(e) refund of RM150,000, stated to have been a further deposit (*cagaran*) paid by the defendant to the plaintiff on 6 June 2001 for obtaining connection of electricity supply to the premises; and

(f) interest.

THE ISSUES

[9] The issues that arose for determination in this case at the close of trial, in my assessment, were:

(a) whether the deed of settlement was a valid contract and the terms and obligation therein were binding on the defendant;
(The subsidiary questions arising under this main issue were:

(i) whether the defendant was 'estopped' in law from resiling from their obligation under the deed of settlement; and

(ii) whether the imposition of the 'current load charges', in the calculation of the electricity charges claimed by the plaintiff had not been agreed to by the defendant and/or was ultra vires the Electricity Supply Act 1990);

(b) whether the plaintiff had established on evidence the amount or quantum of their claim brought now against the defendant;

(c) whether the disconnection of electricity to the premises in question made on 5 October 2005 was wrongful or in contravention of the regulations pertaining to such disconnection;

(d) whether the plaintiff's claim herein was statute-barred under the Limitation Act 1953; and

(e) whether the defendant had, in any event, on evidence proved the counterclaim brought against the plaintiff.

DEED OF SETTLEMENT

Preliminary issue, Account No 0054296000/ Account No 0261–00718078–09

[10] A point canvassed as a preliminary issue by the defendant was that the subject arrears in electricity charges claimed in this action by the plaintiff in respect of electricity supplied to the premises was under an Account No 0261–00718078–09 (see preamble C of the deed of settlement) whilst the 2001-contract between the defendant and the plaintiff bore another account number, namely No 0054296000 (see P1-*kontrak bekalan elektrik/ syarat-syarat pembekalan*).

The seeming significance of this distinction sought to be made by the defendant was that the endorsement as regards the plaintiff's right to impose 'connected load charge' ('CLC'), as a further term under *syarat-syarat pembekalan*, was evidently only related to the P1-contract entered into in 2001 namely, the specific account referred there, being Account No 0054296000.

[11] The defendant's contention as it appeared was that there were two separate and distinct accounts, one which provided the plaintiff the right to impose charges denoted as CLC and to recover the same from the defendant, and the other without any obligatory term on the defendant to meet such CLC imposed.

The endorsement in question which formed an additional term of the contract in-P1 was expressed in the following manner:

> Kehendak Maksima Yang Diisytiharkan (2270.00kW)
>
> Caj Sambungan Beban (Connected Load Charge) bulanan akan dikenakan sekiranya Kehendak Maksima yang direkodkan adatah kurang daripada 75% Kehendak Maksima Yang diisyiiharkan pada RM8.50 setiap kilowatt

[12] The principal controversies related to the endorsement, the imposition of CLC and the defendant's liability to pay such charges (inclusive of the CLC), are dealt with anon in this grounds.

Suffice it for the disposal of this preliminary issue to only state that PW1 in her evidence before the court had explained that when the electricity was connected to the defendant's premises in 2001, the defendant's account with the plaintiff was numbered 06260–0054296000. It was then under the management of 'Pejabat Pengurus Pulau Pinang' but in 2003 there was effected by the plaintiff a rezoning exercise and the subject account was placed under the management of 'Pengurus Cawangan, Bayan Baru'. This resulted in the account to the premises being re-designated or given the

No 0261–00718078–09. It was her evidence that the same *syarat-syarat pembekalan*, inclusive of the CLC endorsement, applied to the supply of electricity to the defendant's premises at all times. A

[13] The defendant did not adduce any evidence to contradict PW1's testimony. Neither did the defendant introduce any other 'syarat-syarat bekalan' (if at all) applicable separately in respect of Account No 0261–00718078–09, if in deed that was the case. B

In the defendant's application for the supply of electricity to the club premises of 4 January 2001, at pp 7–8 of CABD2 (authenticity admitted) under 'butir-butir beban', and more particularly under *data permulaan* (at p 8), the 'maximum load factor' applied for and/or declared by the defendant was as stated there: C

> Anggaran Yunit Sebulan kWj- 304,000
>
> Kehendak Maksima kW- 2270kW. D

[14] It was pertinent to highlight here that one Tan Swee Leong, apparently the managing director of the defendant who had in 2001 made the application for the electricity connection to the premises (see p 7 of CABD2) *and* who also was the signatory for the defendant in 2005 to the deed of settlement (see p 20 of CABD1) was not called as a witness by the defendant to support the defendant's claim that there were two separate accounts, one of which allegedly without any obligation on the defendant to meet CLC imposed by the plaintiff, if that was indeed the case. The defendant's witness, DW1, confirmed that Tan Swee Leong was still in the employ of the defendant but no reason was offered why he was not be made available to clarify whether there were indeed two distinct accounts, if that was true at all. E F

It should be noted too, that admittedly the premises to which electricity was supplied, notwithstanding the two different account numbers, was the same club house and golf course. G

[15] I accepted PW1's testimony that what had occurred was merely a renumbering of the account related to the same electricity supply contract to the premises. There was no merit at all in the defendant's preliminary contention that there was two different accounts in respect of the supply of electricity by the plaintiff to the defendant's premises. H

The defendant estopped from seeking to invalidate deed of settlement I

[16] The deed of settlement dated 10 June 2005 between the parties (pp 15–21 of CABD1) was expressly premised upon the defendant's admission that the defendant was at that point of time in arrears in respect of electricity

charges payable to the plaintiff. It was also entered into at the request of the defendant and acceding to the defendant's own proposal to settle the said arrears by way of ten monthly instalment-payments (see preamble C and D to the deed).

It was not in dispute that the defendant had in furtherance of the terms of the deed thereafter proceeded to affirm its obligation and had effected settlement of the first three instalments due there under, each in the sum of RM25,000. The defendant defaulted in settling the fourth of the agreed instalments, due in the sum RM55,000 as tabulated in the deed, on 24 September 2005.

[17] The defendant did not deny entering into the deed of settlement (see para 4 of statement of defence and submission of counsel for defendant).

However the defendant was now, on being sued for settlement of the outstanding electricity charges owed to the plaintiff, seeking to invalidate the terms of the deed or to extricate themselves from the defendant's express admission of the debt, principally on the following grounds, namely, that:

(a) the CLC imposed by the plaintiff (and included in the calculations of the arrears and also in subsequent bill/charges raised by the plaintiff) was unilaterally done by the plaintiff; and

(b) further or in the alternative, the imposition of CLC by the plaintiff was in any event ultra vires the Electricity Supply Act 1990.

[18] On the evidence led before me, I agreed with submissions of the plaintiff's counsel that the defendant was estopped from now challenging the validity of the deed of settlement. The defendant had led the plaintiff to believe that the defendant would honour their admission of debt and the commitment to settle the arrears by the agreed instalments. This had been further affirmed by defendant's conduct in that, three instalments due pursuant to the terms of the deed had in fact been paid by the defendant. It was too late in the day, upon default and when sued that is, to cry 'foul' and take the position that the deed was invalid ab initio and not binding on the defendant in any event.

The doctrine of estoppel clearly applied against the defendant to preclude the defendant from raising any challenge as to the validity of the deed of settlement in such circumstances.

[19] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, the Federal Court affirmed that the doctrine of estoppel was a flexible principle of wide utility to meet the ends of justice in the circumstances of each case. Speaking through Gopal Sri Ram JCA (as His Lordship then was), the Federal Court stated that estoppel:

> … may be applied to prevent a litigant from asserting that there was no valid or binding contract between him and his opponent … It may operate to bind parties as to the meaning or legal effect of a document or a clause which they have settled upon or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning ….

His Lordship Gopal Sri Ram in the same Federal Court decision also quoted with approval Lord Denning who in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 had observed that:

> … When the parties to a transaction proceed on the basis of an underlying assumption of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so, If one of them seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[20] In *Aseambankers Malaysia Berhad and Ors v Gula Perak Berhad and Anor* [2010] MLJU 1527; [2010] 1 LNS 1409, Hamid Sultan J also noted as follows:

> In addition the conduct of the defendants, the correspondence, admissions in the correspondences, the supplementary agreement as well as part payment paves the way for the doctrine of estoppel to operate.

In this instant case before me, it was an unquestioned fact that between 2001 and 2005, CLC was imposed by the plaintiff in respect of the electricity charges required to be paid by the defendant. In 2005 there was in the deed of settlement an express admission of the arrears of charges (inclusive of the CLC) then outstanding and recoverable by the plaintiff from the defendant. On the defendant's proposal, the plaintiff agreed to a settlement of the arrears by ten monthly instalments and most significantly the defendants had duly effected three of the agreed monthly instalments. Even if the defendant was 'mistaken' or 'misinformed' as regards the 'legality' of his obligation to pay the CLC element included in their monthly electricity bills, the defendant was precluded now from denying liability on that count for the amounts claimed.

[21] It was therefore, in my assessment, inequitable and unjust to allow the defendant to set aside the legal and binding effect of the deed or to countenance the defendant's attempt to avoid their liability to the plaintiff, that too, on purported grounds that had never been raised by the defendant prior to the filing of their defence in this 2012 suit. To the contrary (as further discussed anon), the various letters emanating from the defendant (all relating to Account No 0261–00718078–09, it will be noted) did not at any point challenge the plaintiff's right to impose CLC or dispute the defendant's

obligation to settle the same. The defendant by those letters merely sought for the plaintiff's indulgence or consideration to delay, exempt or waive the CLC payable.

CLC was not ultra vires the Electricity Supply Act 1990

[22] The defendant premised their 'ultra vires' contention on ss 24 and 2 of the Contracts Act 1950, arguing that the imposition of the CLC was 'not lawful' and unenforceable vis a vis the Electricity Supply Act 1950 and /or the Licensee Supply Regulations 1990 (under that Act) and accordingly void.

It was clear that for s 24 of the Contracts Act to bite and invalidate a contract, the consideration or object (of the contract or a term of the contract) had to be forbidden by law, or if the contract was permitted to exist, it would otherwise defeat any applicable provision of law. In *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; [1998] 3 CLJ 503, the Federal Court stated:

> … in a nutshell (that) a contract to do an act illegal by statute or prohibited or forbidden by statute is unenforceable and illegal one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question …

[23] It was the defendant's contention that s 26 of the Electricity Supply Act 1990 which conferred power on the plaintiff to fix tariffs, did not provide for or include power to require a consumer to pay CLC in respect of any 'shortfall' in the projected electricity expected to be consumed or in other words for electricity not utilised by the consumer. The only surcharge, according to the defendant, which the plaintiff could impose was only 'for late payment' pursuant to s 26A of the Act.

This contention of the defendant however overlooked that in the Electricity Supply Act at s 29(1) and (2) itself it was provided that notwithstanding anything provided in ss 24 to 28 of the Act, (that is inclusive of the aforestated s 26), there could exist a special agreement for the supply of electricity and the rights and liabilities of the parties shall be determined by such agreement. Here in this case, P1 with *Syarat-Syarat Pembekalan* (with the endorsement of the further term as to 'Kehendak Maksima Yang Diisytiharkan (2270kW)' and payment of CLC), in my view, did qualify to be treated or deemed as a special agreement as to the terms for supply of electricity as had been agreed between the parties.

[24] It need to be stressed too that there was no prohibition against including a term such as to require CLC to be included in the monthly bills raised by the plaintiff and the plaintiff was not forbidden anywhere to impose such a term. On the other hand, what we had here was an enabling provision for special

terms or agreement to be entered into by the plaintiff with a consumer. In this case, there was also no evidence that the defendant had not freely agreed to accept that further contractual term.

It was my conclusion therefore that the term as regards the payment of CLC charges as part of the defendant's monthly electricity charges was therefore not ultra vires the Electricity Supply Act 1990.

CLC not unilaterally imposed

[25] The further argument of the defendant was that in any event the CLC was unilaterally imposed by the plaintiff.

In my assessment of the material placed before me, there could not be anything that was further from the truth in such an allegation.

As adverted to above earlier, the load factor required by the defendant featured in the defendant's application for supply of electricity of 4 January 2001. The liability of the defendant to meet and settle such CLC charges imposed monthly if the consumption dipped below 75% of such *kehendak maksima* was expressly incorporated by way of the attached 'endorsement', as a term within *syarat-syarat pembekalan* in the contract to supply electricity (P1).

[26] Further, the inference that could be reasonably drawn from the contemporaneous correspondence emanating from the defendant most definitely was to the effect that the defendant was fully cognisant and did not dispute the defendant's liability to settle the CLC.

In the defendant's letter of the 23 September 2003 to the plaintiff, the defendant sought for a waiver of the 'additional levy' for the reasons, there stated by the defendant, to be caused by 'economy down-turn' and '… the monthly overall electricity consumption could not reached the quota that we first required'.

In the defendant's further letter of 16 August 2004, they sought the plaintiff's agreement to settle outstanding electricity bill for May, June, July 2004 ('… (without CLC charges) by 12 monthly installments …'), but there was no protest as to the right of the plaintiff to recover the CLC.

[27] In the defendant's subsequent letter of 11 January 2005 we also find the following interesting passages:

> 3 Kami benar-benar faham banyak pelaburan dan perbelanjaan daripada pihak Tenaga Nasional Berhad dahului ke system-sistem bagi menampung keperluan kami.
>
> Kami juga memahami perkara tersebut dan tidak mengabaikannya kerana ia adalah tanggungjawab pihak kami membayar caj sambungan beban (CLC) tersebut secara ansuran pada satu ketika dahulu.

A 5 Pihak kami sesungguhnya akan membayar caj sambungan beban (CLC) tersebut secara ansuran dan mengaku-janji tidak akan mengabaikan tanggungjawab kami tersebut pada awal tahun 2006 sehingga 2011 yang pasti saluran kewangan kami yang dirangka akan sembuh sepenuhnya.

B Clearly, one would not have made such statements in the ordinary course of one's conduct, if the CLC was indeed 'unilaterally' (ie without consent or knowledge) imposed by the plaintiff on the defendant.

[28] The aforementioned correspondence were before the disconnection of
C electricity to the premises on 5 October 2005. Even after that event, in a letter dated 4 January 2006, the defendant once again '… memohon kepada Pejabat tuan supaya CLC charge dikecualikan …'. This request to be exempted was not acceded to by the plaintiff however.

D The point stressed and to be noted here was that nowhere in any of these letters, prior or post-disconnection, referred above, did the defendant, firstly, dispute their liability to meet the CLC imposed by the plaintiff. More materially however, there was no assertion at all that CLC included in the bills that had been raised by the plaintiff since 2001 was 'unilaterally imposed', as now urged upon the court to believe and hold.

E

[29] That the CLC was unilaterally imposed was in any event an assertion by the defendant and therefore the evidential burden was squarely on the defendant to prove the same. In this respect the crucial witness who could have
F assisted the case of the defendant was Tan Swee Leong, who as alluded to above was the signatory to the 2001-contract and also of the 2005-deed of settlement for the defendant. He was not called by the defendant to testify despite admission by DW1 in evidence that Tan Swee Leong was still in the employ of the defendant.

G Tan Swee Leong's evidence would have been the best evidence, if as submitted by the defendant, the circumstances surrounding the entry of the 2001-contract and/or of the subsequent deed of settlement was to be believed by the court to be suspicious, or if the defendant was to be allowed to contradict the content of those documents already on record. I was convinced that in the
H circumstances I was entitled to invoke the evidentiary presumption pursuant to s 114 (g) of the Evidence Act 1950 to conclude that Tan's evidence, if adduced, would have turned out to be adverse to the defendant's contentions and defences raised in this suit.

I **[30]** In the result, it was my conclusion that the deed of settlement was valid and enforceable by the plaintiff and the contentions of the defendant to avoid meeting their obligations under the deed, or for that matter, the contract with the plaintiff for the supply of electricity to the premises in question (inclusive of the CLC in the charges), was wholly without merit.

NO AMBIGUITY OR INCONSISTENCY IN THE QUANTUM OF THE PLAINTIFF'S CLAIM

[31] I did not find any ambiguity or inconsistency in respect of the amount claimed by the plaintiff in this suit to be recovered from the defendant. The statement of claim stated that the arrears of electricity bill payable by the defendant was RM510,747.17 as at the date of filing of the action.

[32] The plaintiff through their witness PW2 did explain how the said sum was arrived at. Based on a 'bil salinan' dated 28 April 2006 (and admitted as P2), it was his evidence that the arrears of electricity bill due and payable by the defendant as at that date was RM607,276.86.The plaintiff had then credited the defendant account with the following sums:

(a) on 31 May 2006, the sum of RM80,000 realised by the plaintiff from a demand on the bank guarantee which had been provided by the defendant (see pp 22/23 of CABD1);

(b) on 12 November 2008, by the transfer of the sum of RM13,219.47 which was a deposit posted by the defendant and held by the plaintiff; and

(c) on 21 October 2010, by the transfer of the sum of RM3,310.22 which was a further deposit posted by the defendant and held by the plaintiff.

The net sum due and owing by the defendant was accordingly derived amounted to RM510,747.17.

[33] In the deed of settlement the admitted sum owing by the defendant as at 10 June 2005 was RM463,334.08. It was PW1's evidence that the fourth instalment was to be at a sum of RM55,500 together with 'arrears for bill not paid from 24 June 2005' (see table at p 21 which separate into two columns, the payments due towards settlement of 'arrears' and the expected settlement of the 'current month' charges). The defendant failed to effect the said fourth instalment towards arrears and also the settlement of current charges due from 24 June 2005.

In the plaintiff's letter to the defendant of 21 September 2005 (see p 31/32 CABD1) the arrears owed by the defendant as that date was stated to be RM531,473.06 and the proposed settlement by instalments offered by the plaintiff to the defendant was similarly of two components, the balance of 'arrears' and charges for 'current month'.

On P2 (bill as at 28 April 2006) there was also a sum of RM32,674.93 stated to be 'penalti', imposed for late payment.

[34] Electricity to the premises was disconnected on 5 October 2005. The last bill raised as noted on P2 was dated 27 September 2005 for RM574,346.81.

In my assessment the billed figure of RM607,276.86 as at 28 April 2006 (ie before the adjustment of credits) was not unreasonable considering that there was still an intervening period before actual disconnection of electricity to the premises after 27 September 2005 and taking into account further the addition of the penalty sum. There did not appear to me to be any manifest error in the sum claimed by the plaintiff in the circumstances.

The defendant, apart from merely asserting that they have not been provided with particulars of the sum claimed, failed to show how the calculations of the sum claimed by the plaintiff was erroneous. It was always open to the defendant to attend at the office of the plaintiff to obtain the necessary details and not just make a sweeping allegation that they had sought for but had not been provided with the details.

[35] It need to be also observed here that what the plaintiff was claiming in this action was not for 'damages' but for outstanding sum due on bills raised for electricity supplied and the plaintiff's claim here in this action was grounded further on the admission of the defendant expressly set out in the deed of settlement as to the defendant's liability to settle such 'arrears' and 'current monthly bills'.

The defendant's contention therefore that it was incumbent upon the plaintiff to prove the sum claimed to the hilt, as if in an action for 'damages' was, in my view, misplaced, if not wholly misconceived. The defendant was the party who raised the issue as to inconsistency or discrepancy in the amount claimed and it was for the defendant to discharge that evidential burden. I held that the defendant had failed to do so.

DISCONNECTION OF ELECTRICITY TO THE PREMISES ON 5 OCTOBER 2005 WAS PROPERLY DONE

[36] The defendant alleged that the electricity supply to the premises was wrongfully disconnected on 5 October 2005, in contravention of the Licensee Supply Regulations 1990 or the parent statute, the Electricity Supply Act 1990.

It would be recalled that the fourth instalment under the deed of settlement towards settlement of arrears (this time together with billed current monthly charges) was due on 24 September 2005. The defendant had applied for 'postponement' (*penangguhan*) of CLC but the plaintiff had by letter of 21 September 2005 to the defendant refused the request and had maintained that the next monthly instalment (although requantified) was to be paid on 24 September 2005.

[37] On 24 September 2005 when no payment was received the plaintiff issued to the defendant a *notis pemotongan bekalan elektrik* where in, inter alia, there was the following: A

(a) a demand that the all payments outstanding be settled within 30 days of service of the bill; and B

(b) a notice that if payment was not received by 4 October 2005, the electricity supply to the premises would be disconnected on 5 October 2005.

This notice referred to reg 4(1) and (2) of the Licensee Supply Regulations 1990 (as amended in 2002.) C

[38] The reg 4(1) and (2) in question were as follows:

(1) Bills in respect of amounts due to the licensee shall be rendered to the consumer monthly and shall be paid within thirty days of its presentation. D

(2) In default of payment the consumer's supply of electricity from the installation may be disconnected by serving a notice, by registered post or delivered by hand to the registered address of the consumer stating the reason and the date the supply is to be disconnected at least seven working days in advance, before the intended disconnection: Provided that no disconnection of the supply shall be carried out during the eve of weekends or public holidays. E

[39] In my reading, the principal objective behind the *notis pemotongan bekalan elektrik* of the 24 September 2005 was, as the subject/title of the letter stated, to give the defendant notice of the intended disconnection of electricity to be effected by the plaintiff on 5 October 2001. F

In this instant situation the notice of intention to discontinue was issued on 24 September 2005 and there was a lapse of the more the seven days period as required before the disconnection was effected on 5 October 2005. G

How then and with reference to what 'default' was the qualifying/opening words to reg 4(2), namely 'In default of payment …', to be construed? It was my view in this respects that what had to be borne in mind was that this 'notis pemotongan bekalan elektrik' was not a normal monthly bill raised for electricity charges incurred for consumption of the utility during the previous month. Here what was being dealt with and addressed to was the arrears or overdue admitted amount owed to the plaintiff under the deed of settlement and which the defendant was obliged to pay but had failed to settle on 24 September 2005. H I

In the circumstances, my reading of the demand for payment to be made within 30 days ('… dijelaskan dalam masa 30 hari daripada tarikh penyerahan bil bagi mengelakkan tindakan pemotongan elektrik ke premis tuan/puan') in

that 'notis' was superfluous and could be rightfully ignored. Alternatively, it only meant that the defendant had been granted further time up to 24 October 2005 to settle all payments due to the plaintiff (that is, if not settled by the 4 October 2005). The focus of the *notis*, it could not be denied, was the intended disconnection of electricity on 5 October 2010 for default of payment.

What was therefore in issue was only whether the seven days minimum period of notice before my disconnection, had been given and, as shown above, the stipulated time line had been complied with by the plaintiff in this case.

[40] The defendant's solicitors protest in respect of the disconnection came only some seven months later (27 July 2006) was of no consequence, save for the inference that could be drawn therefrom that the defendant had no reasonable or immediate dispute as to the plaintiff's right to disconnect electricity to the premises as was done on 5 October 2005.

THE PLAINTIFF'S CLAIM WAS HOWEVER STATUTE BARRED

[41] The defendant at para 12 of the statement of defence specifically pleaded limitation and the plaintiff's claim in this action rendered unsustainable on that count, in any event.

Relying on s 6(1)(a) of the Limitation Act 1953, it was contended by the defendant that an action founded on contract (as in this case) had to be brought within six years of the cause of action accruing to the plaintiff. In this instant case scenario the breach of the deed of settlement occurred no doubt with the happening of the default by the defendant in the payment of the fourth instalment due under the deed, that is, on 24 September 2005. It was submitted that the six year period allowed for an action to be instituted had thereby expired on 23 September 2011 and as this action was only filed on 28 February 2012, it was accordingly time barred.

[42] On the other hand, it was the plaintiff's contention that time began to run only after the plaintiff had encashed the bank guarantee held by them and had applied the same as part payment towards settlement of the amount owed by the plaintiff. This the plaintiff contended was on 31 May 2006 and accordingly the six years period according to the plaintiff only expired on 30 May 2012, within which time this action had been instituted.

The plaintiff relied on s 26(2) of the Limitation Act 1953 and urged upon the court to hold that the monies received pursuant to the demand made on the bank guarantee was in effect a 'payment' by the defendant to account of the accrued outstanding sum and the plaintiff's right to recover only arose after receipt of the monies under the bank guarantee.

[43] Section 26(2) of the Limitation Act 1953 was in the following terms: A

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and *the person liable accountable therefore* acknowledges the claim or *makes any payment in respect thereof*, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment; B
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt. C

(Emphasis added.)

[44] After having given anxious consideration to the submission of the plaintiff's counsel, I was of the view that s 26(2) was of no assistance to the D plaintiff in the circumstances obtaining here in this case. The monies pursuant to the encashment of the bank guarantee did not come from the defendant (person liable or accountable for the debt). It was trite that a bank guarantee of the nature here (see pp 22/23 of CABD1) was an separate and independent contract between the plaintiff and the bank only and as provided therein the E bank was to pay the plaintiff within seven days of receipt of the relevant notice of default (see cl 3). The plaintiff was entitled to enforce this contract of guarantee (or indemnity, in a sense) without reference to the defendant and interestingly as stated in cl 6, notwithstanding even the defendant's 'liquidation or winding-up'. F

[45] Payment received under the bank guarantee from the bank did not emanate therefore from the defendant and by no stretch of argument could it be justified or deemed, in my view, as a 'part payment' made by the defendant to qualify for the postponement envisaged by s 26(2) of the Limitation Act G 1953. No notice or consent of the defendant was involved at all here. The purport and intent of that subsection was clear that the 'payment' had to come from the debtor directly. It was not the function of the court to add to or vary the plain meaning of the words used in the legislation. H

[46] A further inherent fallacy evident in that contention of the plaintiff was this. Assuming that as argued by the plaintiff, the cause of action in this case only accrued or crystallised after the encashment of the bank guarantee, this would have meant that the plaintiff could choose to take its own time to make a demand on the bank. An affected debtor, like the defendant in this case, I would be prejudiced by indefiniteness of proceedings. The underlying purpose behind such limitation provisions, was to ensure that a party who wished to assert a right or claim had to pursue it with promptitude and without delay and that there ought to be certainty and finality with regards such claims or

assertion of rights. What was then being canvassed here by the defendant, surely would not have been the intention behind the provisions of the Limitation Act 1953.

In this case, it must be highlighted that the breach by the defendant occurred on 24 September 2005 and the plaintiff was, in any event there upon, immediately entitled to make a call on the bank guarantee (notwithstanding that in this case the guarantee was valid and operative till 7 July 2006).

[47] It was counsel for the defendant's contention that the date from which time began to run against the plaintiff was the 24 September 2005 that is, upon default in payment by the defendant of the fourth instalment under the deed of settlement.

I was however of the view that the time for the calculation of the six year period only commenced on 23 October 2005. As would be recalled, the plaintiff had in their 'notis pemotongan bekalan elektrik' of 24 September 2005 (see p 12 of CABD2) demanded payment of all sums owed to the plaintiff within 30 days of service of that notice. The defendant had therefore been granted up to 23 October 2005 to effect settlement and the plaintiff's cause of action to recover the debt owed by the defendant accrued only upon the defendant's failure to settle the demanded sum on that later date. (As earlier discussed this was a separate matter from the notice of intention to disconnect electricity connection to the premises.)

THE PLAINTIFF'S CLAIM DISMISSED

[48] For the reasons discussed above and notwithstanding that the plaintiff's claim was otherwise proved, I was constrained to dismiss the plaintiff's claim. On 28 February 2012 when this action was filed, the plaintiff no longer had any actionable cause of action. The plaintiff could only have legally succeeded on their claim if the suit had been filed before 22 October 2011 (that is, within six years of 23 October 2005).

THE COUNTERCLAIM OF THE DEFENDANT

[49] It followed from the conclusion reached by me that the deed of settlement was valid and enforceable against the defendant, and further that the plaintiff had proved the sum of RM510,747.17 claimed in the statement of claim, that the defendant was definitely not entitled to:

(a) the refund of the RM75,000, the total instalments paid by the defendant pursuant to the deed of settlement;

(b) the refund of the RM80,000 realised by the plaintiff through a call on the bank guarantee, upon default of the defendant; and

(c) the refund of the deposits in the aggregate sum of RM16,529,69 held by the plaintiff to account but applied to reduce the outstanding amount due from the defendant.

[50] The only other head of counterclaim put forward by the defendant was for a rounded sum of RM75,000 alleged to be cost and expenses related to the operating and maintenance of a own generator (for the production of electricity) after the electricity supply was disconnected by the plaintiff on 5 October 2005.

In respect of this item/head of claim too, it was obvious that the defendant was not entitled to recover the sum claimed, or any amount at all, since as also deliberated and held by me above, the disconnection of electricity by the plaintiff on 5 October 2005 was not improperly or wrongfully done. The seven day notice requirement before disconnection had been given and the defendant had defaulted in the payment of the fourth instalment and current monthly charges due on 24 September 2005.

[51] In any event, there was no evidence led by the defendant that a 'generator' as alleged had been procured or used at all by the defendant as alternate source of electric power. Such evidence ought to have been readily available to the defendant if that was indeed the case. The defendant's claim in this respect was a bare claim without such evidence.

It was trite that a party claiming for 'damages' had the burden of proving both the fact of and the amount of the expenses or damages supposedly incurred or suffered (*Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 quoted and approved by Court of Appeal in *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 2 MLJ 314; [2012] 1 CLJ 959). Neither of this evidentiary requirements had been met by the defendant.

[52] Accordingly, I was also constrained to dismiss the counterclaim of the defendant.

THE COSTS

[53] Considering that both parties had failed in their claim and counterclaim respectively, I ordered that each party was to bear their own costs in respect of this proceedings.

A *Plaintiff's claim and defendant's counterclaim dismissed.*

Reported by Kanesh Sundrum

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